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# IN THE
# COURT OF APPEALS OF INDIANA

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| NORTH AMERICAN CAPITAL CORP/MBNA AMERICA BANK, | ) | |
| Appellant-Plaintiff, | ) | |
| vs. | ) | No. 48A02-0612-CV-1149 |
| KELLY NANTROUP HICKMAN, | ) | |
| Appellee-Defendant. | ) | |

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Jack L. Brinkman, Judge
Cause No. 48D02-0006-CR-356

**June 26, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Plaintiff, North American Capital Corp./MBNA America Bank (North American), appeals the trial court's Findings and Recommendations to set aside its garnishment order in favor of Appellee-Defendant, Kelly Nantroup Hickman (Hickman).

We reverse and remand.

## ISSUE

North American raises three issues on appeal, which we consolidate and restate as the following issue: Whether the trial court abused its discretion by setting aside its previous order to garnish Hickman's wages.

## FACTS AND PROCEDURAL HISTORY

On June 13, 2000, North American, as the assignee of a credit card debt owed by Hickman, commenced a lawsuit against her. Later that month, on June 29, 2000, Hickman filed an answer to the court, conceding that she owed the debt. After North American filed a Motion for Judgment on the Pleadings based on Hickman's admission, the trial court rendered a judgment against Hickman on October 16, 2000 in the amount of $6,558.17, plus 8% interest per annum and costs. Hickman never paid the judgment balance.

On March 7, 2005, North American filed a Motion for Proceedings Supplemental to Execution against Hickman seeking execution of the previous judgment. That same day, the trial court ordered Hickman's employer, Pizza King, to answer interrogatories concerning her employment. On April 20, 2005, after receiving Pizza King's answer, the trial court conducted a garnishment hearing. At the close of the hearing, the trial court

issued a continuing garnishment order against Hickman at her place of employment, ordering Pizza King to deduct 25% from Hickman's weekly disposable earnings, or the amount by which her disposable earnings exceed $154.50 per week, whichever is less.

On January 23, 2006, Hickman submitted correspondence to the trial court indicating that garnishing 25% of her wages was not "fair." (Appellant's App. p. 12). Characterizing Hickman's letter as a Motion to Set Aside the Garnishment Order pursuant to Ind. Trial Rule 60(B), the trial court set the matter for hearing. On February 13, 2006, the trial court heard arguments and took the matter under advisement. Thereafter, on November 22, 2006, the trial court issued its Findings and Recommendations, summarily holding in pertinent part:

> That [Hickman's] garnishment order shall be set aside effective December 1, 2006.
> That [Pizza King] will cease withholding from the wages of [Hickman].
> That any money received by the Clerk of this [c]ourt, as of said date, shall be returned to [Hickman].

(Appellant's App. p. 8).

North American now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

North American contends that the trial court abused its discretion by setting aside a valid garnishment order without Hickman presenting any legal basis or evidence to vacate the order.

### I. *Standard of Review*

At the outset, we note that Hickman did not file an appellee's brief. When an appellee does not submit a brief, an appellant may prevail by making a *prima facie* case

of error. *Village of College Corner v. Town of West College Corner*, 766 N.E.2d 742, 745 (Ind. Ct. App. 2002). *Prima facie* in this context is defined as "'at first sight, on first appearance, or on the face of it.'" *Id*. Such a rule protects this court and relieves it from the burden of controverting arguments advanced for reversal, a duty which properly remains with appellee. *Id*.

When reviewing a grant or denial of a T.R. 60(B) motion, we are limited to whether the trial court abused its discretion. An abuse of discretion occurs where the trial court's judgment is clearly against the logic and effect of the facts and inferences supporting the judgment for relief. *Summit Account & Computer Service v. Hogge*, 608 N.E.2d 1003, 1005 (Ind. Ct. App. 1993). Additionally, neither party requested special findings and the trial court did not enter any. When the trial court enters a general judgment without special findings and conclusions, we may not reweigh the evidence or consider witness credibility but must affirm if sustainable on any legal theory. *Porter v. Bankers Trust Co. of California, N.A.*, 773 N.E.2d 901, 904 (Ind. Ct. App. 2002). In reviewing a general judgment, we must presume that the trial court followed the law. *Id*.

II. *Analysis*

Upon a motion for relief from judgment, the burden is on the movant to show sufficient grounds for relief under T.R. 60(B). *Involuntary Termination of Parent-Child Relationship of K.E. v. Marion County Office of Family and Children*, 812 N.E.2d 177, 179 (Ind. Ct. App. 2004), *trans. denied*. T.R. 60(B) enumerates several reasons for setting aside a final judgment. Specifically, the trial rule provides, in pertinent part:

> On motion and upon such terms as are just the court may relieve a party or his legal representative from a . . . final order . . . for the following reasons:
>
> (1) mistake, surprise, or excusable neglect;
>
> (2) any ground for a motion to correct error, including without limitation newly discovered evidence, which by due diligence could not have been discovered in time to move for a motion to correct errors under Rule 59;
>
> (3) fraud . . ., misrepresentation, or other misconduct of an adverse party;
>
> . . .
>
> (8) any reason justifying relief from the operation of the judgment other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).
>
> The motion shall be filed within a reasonable time for reason[] . . . (8).

Here, the trial court's Findings and Recommendations failed to specify the specific ground pursuant to T.R. 60(B) relied upon to set aside the garnishment order. Furthermore, neither in her correspondence to the trial court, nor at the February 13, 2006 hearing, did Hickman clarify the basis for her request.

Nevertheless, after reviewing Hickman's letter and the hearing's transcript, we will consider her claim under T.R. 60(B)(8). In her correspondence, resulting in the hearing to set aside judgment, Hickman alleges that

> [N]ow they are garnishing my wages. They are taking out 25% of my check and I don't think that's fair and I didn't get a chance to plea my case. . . . I can't afford 25%. I'm a waitress and I don't make that much money.

(Appellant's App. p. 12). Then, at the hearing, Hickman informed the trial court that her husband is a stay-at-home dad, caring for their two children. She clarified that he could go to work but is having difficulties finding employment. At this time, she indicated to the trial court that she could not afford a garnishment of 25%. Hickman testified:

> I should make anywhere from two hundred to two hundred and fifty dollars. But here lately it has been slow and we get sent home early and I work on the average of sixteen hours a week which I could get anywhere from twenty to twenty-five when we are busy. But here is one time I put in seventy-two hours for two weeks. And I only got two hundred and fifteen dollars [when] I should have made three hundred and seventy-one dollars.

(Transcript p. 7). Accordingly, Hickman requested the trial court to lower the garnished amount to twenty-five dollars a month. Balancing the interests of both Hickman and North American, the trial court stated:

> I'm going to do some number crunch[ing] and I understand the situation you are in. It is just to give what you want, you will never pay your debt off. That is not fair to the creditor. [The] creditor has a right to have something taking down the debt at some point. You would never pay it off at the rate that you are wanting to pay it because the interest . . . and it is set by statute. Your interest i[s] fifty-eight dollars a month. And if we set it at just a hundred dollars a month, it is fifteen years you will be paying this thing.

(Tr. pp. 12-13). Thus, based on the general content of Hickman's letter, her trial testimony and request to the trial court, we will evaluate her claim under the equitable relief provision of T.R. 60(B)(8), providing that a party may seek relief for "any reason justifying relief."

In order to be granted relief pursuant to T.R. 60(B)(8), the movant must file her motion "within a reasonable time" and must affirmatively show some extraordinary circumstance in addition to a meritorious claim or defense. T.R. 60(B)(8); *In Re Adoption of T.L.W.*, 835 N.E.2d 598, 601 (Ind. Ct. App. 2005). A meritorious defense is one showing, that if the case was retried on the merits, a different result would be reached. *See K.E.*, 812 N.E.2d at 180.

Here, Hickman merely presented her own personal circumstances, together with a plea to the trial court to lower her garnishment. The record is devoid of any evidence establishing an extraordinary circumstance, let alone, a meritorious claim or defense, as required by T.R.60(B)(8). Due to Hickman's failure to carry her burden of proof, we conclude that the trial court abused its discretion by granting her relief from the garnishment order. Therefore, we reverse the trial court's Findings and Recommendations and remand for further proceedings in line with today's holding.

## CONCLUSION

In light of the foregoing, we find that the trial court abused its discretion by setting aside its previous Order to garnish Hickman's wages pursuant to T.R. 60(B)(8).

Reversed and remanded.

NAJAM, J., and BARNES, J., concur.